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QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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December 2[illegible], 1991.

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No. 91-194

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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Interest of the Amicus Curiae

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State of New York, is exercising the right to file a brief amicus curiae in support of the position of the State of North Dakota.

The City's interest in the case arises from the fact that similar questions of tax liability arise under a sales/use tax law imposed for its benefit and will later arise when its own presently suspended sales/use tax becomes effective again.

The State of New York has a sales/use tax of 4%. N.Y. Tax Law, Article 28. An essentially identical tax was imposed by New York City pursuant to the authority given by N.Y. Tax Law, Article 29. During the City's fiscal crisis in the mid-70's, the authority of the City to impose the tax was suspended until various bonds issued to help the City were repaid. Instead, the State itself imposed a sales/use tax of 4%, similar to its own such tax, for the benefit of the City. Tax Law §1107. Later an additional tax of the same nature was imposed at the rate of one-quarter of one percent within the territorial limits of the Metropolitan Commuter Transportation District

(which includes all of New York City) with the resulting revenue to be transferred to the Mass Transportation Operating Assistance Fund. N.Y. Tax Law §1109.

In 1989 the State enacted a law designed to make sure that its use tax would be applied to a person who regularly or systematically solicits business in New York by distribution, regardless of the location from which the distribution originated, of catalogs, advertising flyers, letters or the like and who, as a result, makes sales within the State of personal property, such tax liability to apply to the extent that the nexus requirement of the United States Constitution is satisfied. New York Laws 1989, ch. 81, §246, amending Tax Law §1101, subd. b, par. 8(i)(E). This new provision is equally applicable to the tax the State imposes for New York City. N.Y. Tax Law §1107(a). When the suspension of the original City imposed sales/use tax terminates, the tax then

reinstated will also be subject to the 1989 New York law passed with regard to mail order sales.

It has been estimated by the New York State Commissioner of Taxation and Finance that the State and its local governments are losing $200 million a year because of the failure of mail order businesses to collect or pay sales or use taxes. New York Newsday, June 19, 1991, p.28. Since the City's sales tax is almost equal to that of the State, it would appear that the City's loss is close to $100 million.

It is clear then that a decision in this case will have an impact on tax revenues of New York City.

ARGUMENT

A MAIL ORDER VENDOR MAY BE REQUIRED TO COLLECT A USE TAX IN A STATE WHERE IT HAS NO OFFICE OR REPRESENTATIVES SO LONG AS IT HAS AN ADEQUATE NEXUS TO THAT STATE. UNDER THESE CIRCUMSTANCES NEITHER THE COMMERCE NOR THE DUE PROCESS CLAUSES ARE VIOLATED.

a. Changes in the method of interpretation of commerce clause.

For many years the commerce clause was applied to State taxation in a rigidly formalistic manner. In essence, the rule was that a state tax on any activity or process of interstate commerce was invalid as a "regulation of interstate commerce." An early example is Case of the State Freight Tax, 15 Wall. (82 U.S.) 232 (1872). Later, license taxes on "drummers" were invalidated when they merely came into a State to solicit sales for an employer in another State. Robbins v. Shelby Taxing District, 120 U.S. 489 (1887); Asher v. Texas, 128 U.S. 129 (1888); Brennan v. Titusville, 153 U.S. 289, 306 (1894). An analogous license tax was set

aside in McCall v. California, 136 U.S. 104, 114 (1890). In Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888), the Court, in the course of denying validity to a licence tax on a telegraph company, succinctly restated the rigid rule and indicated a variety of taxes which would be nullified under it.

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917), made it clear that the rule would apply to a gross receipts tax. Similarly, it was held that a tax based on two factors, the proportion of the total value of capital shares attributed to transactions in the taxing state and the proportion of net income from such transactions, must be set aside. Alpha Cement Co. v. Massachusetts, 268 U.S. 203, 218 (1925).

Indications that the rigid rule was being modified, at least to the extent to which other considerations were taken into account in deciding the impact of the commerce clause on

State taxation, can be seen in two cases which upheld use taxes imposed on a vendee located in the taxing State. Henneford v. Silas Mason Co., 300 U.S. 577, 581, 587-588 (1937); Southern Pac. Co. v. Gallagher, 306 U.S. 167, 177-178 (1939).

Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939), upheld a provision in a use tax law which required the vendor to collect the tax. There the vendor's sole connection to the taxing State was the use of two general agents to solicit orders for it and the providing of offices for each of these agents with the lease designating the vendor as the lessee.

In McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), the Court appeared to be adopting a more realistic approach to the problem. It upheld a sales tax which required the seller to collect the tax from the buyer despite the fact that it produced the coal sold in another State. Its activities in the taxing

State consisted of delivering the coal there, maintaining a sales office for its salesmen and entering into its sales contract with the local customers.

The approach of the Court to the commerce clause issue was different from the old rigid rule. At the outset it said (309 U.S. at pp. 45-47):

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.
>
> But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all

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* Foot Note omitted.

> state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited.

See, also, 306 U.S. at pp. 48, 50-51, 54-57.

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941), sustained a use tax requirement that the seller collect the tax on mail order sales although the orders were sent to the vendor outside the taxing State and were filled by direct shipments through the mail or by common carrier. This was based on the presence in the taxing state of retail stores owned by the seller even though those stores did not participate in the mail order sales. To the same effect: Nelson v. Montgomery Ward, 312 U.S. 373 (1941); Pacific Tel. Co. v

Gallagher, 306 U.S. 182 (1939). Similar realistic approaches formed the basis for sustaining a gross receipts tax in Harvester Co. v. Dept. of Treasury, 322 U.S. 340 (1944).

Under the old rigid approach, the tax involved in General Trading Co. v. Tax Commn., 322 U.S. 335 (1944), would undoubtedly have been stricken as a regulation of interstate commerce. There, a Minnesota corporation, not qualified to do business in Iowa, used traveling salesmen to solicit orders in Iowa, and the goods sold were delivered from Minnesota by common carrier or mail after acceptance of the order in Minnesota. The seller had no retail stores or sales office in Iowa. Yet it was held appropriate to compel it to collect the use tax from its customers. The reasoning on which this result was reached was succinctly stated by Justice Frankfurter (322 U.S. at p. 338):

"Of course, no State can tax the privilege of doing interstate business. See Western Live Stock v. Bureau, 303 U.S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See Best & Co. v. Maxwell, 311 U.S.454. None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be--a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer--the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is familiar and sanctioned device."

Nevertheless, taxes were held unconstitutional, in cases which purported to apply the new approach, despite the narrowest

of differences between those cases and the cases upholding taxes. In McLeod v. Dilworth Co., 322 U.S. 327 (1944), with facts essentially identical with General Trading Co., the tax was set aside because it was a sales tax, not a use tax as in the other case.

A license tax on a vendor based solely on its solicitation in the taxing jurisdiction was invalidated because, with regard to sellers from other states, it was likely to be discriminatory and because the amount of tax had no relation to the volume of business transacted. Nippert v. Richmond, 327 U.S. 416 (1946).

Soon thereafter a tax was stricken on reasoning which was not too different from that applied under the former rigid approach. Freeman v. Hewitt, 329 U.S. 249 (1946).

In Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), it was held that a Delaware corporation selling merchandise in its store in that State could not be required to collect a

Maryland use tax when it used its own trucks to deliver the articles purchased to Maryland customers. Here again there are references to the new approach, but the reasoning is reminiscent of the original view of the impact of the commerce clause on State taxation.

The vendor, however, was compelled to collect a use tax even though it had no office or place of business in the taxing state and had no property or full time employees there so long as it had wholesalers or jobbers in that State soliciting sales for it. Scripto v. Carson, 362 U.S. 207 (1960).

In many of the more recent cases earlier decisions were, in effect, overruled or the reasoning on which they were decided were cast aside and replaced with a more realistic approach. In at least two cases, the Court specifically overruled earlier cases. Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), was overruled by Complete Auto Transit

v. Brady, 430 U.S. 274, 288-289 (1977). [See Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734, 740 f.n. 11 (1978).] Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937), and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947), were overruled by Washington Rev. Dept. v Stevedoring Assn., supra, 435 U.S. at 750.

b. National Bellas Hess

(1)

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), involved an attempt by Illinois to collect use taxes from a Missouri mail order vendor which had no tangible property in Illinois, had no sales outlets, representatives, telephone listing or solicitors in that State and did not advertise there by radio, television, billboards or newspapers. The seller mailed catalogs twice a year to its customers in all States, including Illinois, supplemented by occasional "flyers."

Orders were mailed to the vendor's Missouri plant, and the goods purchased were delivered by mail or common carrier. The Court held that the commerce clause prohibited Illinois from requiring the vendor to collect the use tax.

The majority opinion first pointed out that in the area involved a challenge under the commerce clause or one under the due process clause are "closely related" (p. 756). To escape the bar of the due process clause, it must be shown that the State has given something for which it can ask a return, and the "same principles have been held to apply to collecting use tax when challenged under the commerce clause" (p. 756). There must be a minimum connection between the State and the person, property or transaction it seeks to tax.

The Court then referred to several of its cases which had upheld use tax provisions requiring an interstate seller to collect use taxes. It said, however, that it had never

held that a State may require collection of a use tax where the seller's only connection with its customers in the State is by common carrier or by mail, relying on statements made in two cases in which the application of the use tax had been upheld. It concluded that it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions there involved; and that, if the power of Illinois to impose the use tax burdens were upheld, the impediments upon the free conduct of interstate business would be neither imaginary nor remote. It supported this view by referring to the burdens which would be cast since, if the Illinois action were sustained, every State and every municipality or political subdivision with the power to impose sales and use taxes could apply similar requirements despite the variations in the rates of tax, in allowable exemptions and in administrative and record-keeping requirements.

This, it said, would entangle the vendor in a "virtual welter of complicated obligations to local jurisdictions with no legitimate claim to seek a fair share of the cost of local government" (pp. 759-760).

Although grounds for distinction between the Bellas Hess case and the present one may be drawn, we respectfully submit that Bellas Hess should be overruled. It should be noted that we are dealing in an area of law in which this Court has indirectly or specifically overruled earlier determinations.

The attitudes of scholars obviously are not determinative of action by this Court, but certainly their views may be considered. A substantial number of academicians and legal writers in the area of law here involved have either decided that Bellas Hess was wrongly decided or that subsequent developments call for its being overruled or have criticized its reasoning. Some examples of these views are:

Hartman, Collection of the Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993, 1003-1015 (1986); Lockhart, A Revolution in State Taxation of Commerce, 65 Minn. L. Rev. 1025, 1050-1052 (1981); Simes, The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes, 73 Nw. U.L. Rev. 112, 132-133 (1978).

(2)

Before analyzing the Bellas Hess case, we will refer briefly to subsequent cases which indicate that the Court is moving toward a more realistic and reasonable approach to the impact of the commerce clause on State taxation. That clause is no longer being used as a sword to destroy State taxes, but as a shield to protect interstate commerce from being disproportionately taxed.

Complete Auto Transit, Inc. v. Brady, supra, 430 U.S. 274, sustained a gross receipts tax for the privilege of doing business on

payments made to a motor carrier of cars manufactured in another State which were delivered in such a manner as to make what it did an interstate activity. This case, as previously noted, overruled the earlier Spector decision. The Court emphasized that the mere act of carrying on a business in interstate commerce does not create an exemption from State taxation and that the commerce clause was not designed to relieve those engaged in interstate commerce from their fair share of a State's tax burden (pp. 288-289). Earlier in the opinion the Court described a four prongs test that had been used in determining whether a tax on interstate commerce was permissible. It said that these decisions (p. 279)

> "have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

See, also, page 287.

National Geographic v. Cal. Equalization Bd., 430 U.S. 551 (1977), upheld a requirement that a mail order business selling property in interstate commerce collect a use tax in the State of delivery. The vendor also published a magazine, and it had two offices in California used to solicit advertising for the magazine. Although these offices had no relation to the mail order business, it was held that they formed sufficient nexus to make the California use tax applicable. The Bellas Hess case was distinguished on the ground that there the seller's only connection with the taxing State was by common carrier or by mail (p. 559).

Washington Rev. Dept. v. Stevedoring Assn., supra, 435 U.S. 734, also overruled two earlier decisions. It held that a gross receipts tax could be applied to the gross income of the interstate commerce activity of a stevedoring company. Relying on the Complete Auto case, it concluded that a State tax may be

imposed on one engaged solely in interstate commerce (pp. 745-747). It noted that interstate commerce must bear its fair share of the State tax burden. It said that the Court repeatedly had sustained "taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State" (p. 750).

In D. H. Holmes Co. v. McMamara, 486 U.S. 24 (1988), a Louisiana use tax was held properly applicable to catalogs shipped into the State and delivered to residents therein when the company arranging for these shipments owned 13 department stores in Louisiana. This case is merely a slight variation on prior cases since the company which was taxed owned stores in the taxing state. Statements made by Chief Justice Rehnquist point out that the tax was fairly related to benefits provided by the

State because the services provided by Louisiana included police and fire protection for the stores and the running of mass transit and the maintenance of public roads which benefits the customers (p. 32). In concluding that the distribution of the catalogs reflects a substantial nexus with Louisiana, reference was not only made to the department stores in the State, but to the fact that the catalogs were designed to improve sales among the residents enhancing the Louisiana business (pp. 32-33). The Bellas Hess case was distinguished on the ground that here the taxpayer had more economic presence in the taxing State and received more direct benefits from it (p. 33).

Goldberg v. Sweet, 488 U.S. 252 (1989), involved an Illinois 5% tax on the gross charge for interstate telephone communications originating or terminating in that State and charged to an Illinois service address, regardless of where the telephone call is billed

or paid. An identical tax was imposed on intrastate telecommunications. A credit was given to a taxpayer to the extent that a tax had been paid in another State for a telephone call subjected to the Illinois tax.

At the outset of the opinion the Court briefly outlined the "massive technological" changes which had occurred recently in the telecommunications industry. The tax, challenged on commerce clause grounds, was found valid after testing it pursuant to the four-pronged test applied in the Complete Auto case. An argument that the tax was not fairly apportioned, based on the second prong of that test, was rejected because, if every State were to impose a similar tax, only one State would tax each interstate telephone call. Similarly a contention that a tax on an interstate activity must be apportioned to cover only the in-state activity was denied on the ground that sales or use taxes had been upheld under analogous

circumstances and because the tax law reflects the way in which consumers purchase telephone calls.

A third prong argument, that the tax discriminated against interstate commerce, was quickly disposed of by showing that the tax was on a resident of the State imposing it and that it would be impossible to measure the activities within the State because the exact paths of electronic signals could neither be traced or recorded.

Applying the fourth prong, that the tax is fairly related to the services provided by the taxing State, the Court refused to confine the services provided to telecommunication equipment, holding that interstate commerce "'may be required to contribute to the cost of providing all governmental services, including services from which it arguably receives no direct "benefit."'" It said that providing police

and fire protection and other general services sufficed to meet the fourth prong.

In a brief concurring opinion Justice Scalia said that he remained of the view that only taxes that facially discriminate against interstate commerce violate the negative commerce clause. He cited his concurring and dissenting opinion (joined by Chief Justice Rehnquist) in Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 254 et seq. (1987).

In Amerada Hess Corp. v. N.J. Taxation Div., 490 U.S. 66 (1989), an attempt was made to set aside New Jersey's Corporation Business Tax. That tax provided for the usual three-factor formula for income earned in interstate commerce, but the ground for attack, under the commerce, due process and equal protection clauses, was that no deduction from income was made for payments to the federal government for its Windfall Profit Tax.

The Court found that the failure to provide such a deduction did not violate any of the four-prongs test stated in Complete Auto. In the course of showing this, it stated that the tax is fairly related to benefits New Jersey provides, including police and fire protection and the advantages of a civilized society (p. 79). The Court decided, in addition to rejecting the equal protection argument, that satisfying the four-prongs of the test sufficed to show that due process was not violated (p. 80).

Justice Scalia concurred on the ground that, since the tax does not facially discriminate against interstate commerce, this suffices to deny a claim that a State tax violates the commerce clause. He added that, to the extent that the Complete Auto analysis pertains to the due process requirement, the requirment had been met (pp. 80-81).

Trinova Corp. v. Michigan Dept. of Treasury, __U.S.__, 111 Sup. Ct. 818 (1991), sought to set aside a value added tax on the ground that its apportionment formula was not a fair one and that the tax discriminated against interstate commerce. Both of these contentions were rejected. In doing this the Court again relied on the four-prongs test of the Complete Auto case and it emphasized that, in dealing with the impact of the commerce clause on State taxation, formalism should be avoided and reliance should be had on a "'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax'" (pp. 828-829). In his concurring opinion Justice Scalia reiterated his view that, if the tax is not facially discriminatory, it meets the requirements of the commerce clause.

(3)

The cases since the Bellas Hess decision show a complete rejection of the earlier

formalistic approach to commerce clause challenges to State taxation and an emphasis on the practical effect of any such tax. The test used is the four-part one of Complete Auto. And, perhaps more important, is the flexible manner in which it has been applied. Since the time that Bellas Hess was decided in 1967 and the present there have been changes in circumstances which warrant consideration. The amount of sales made by mail order businesses has skyrocketed and their failure to collect sales or use taxes from their customers has caused substantial losses in tax revenues to the States imposing such taxes. In addition, there has been an explosion in the methods of using computer and similar devices, and a sharp reduction in the cost of such equipment.

Bellas Hess did not deal with prongs two and three of the Complete Auto test, the need for fair apportionment and a lack of discrimination against interstate commerce.

That a use tax meets these two prongs was well established by earlier cases upholding use taxes. See, for examples, Felt & Tarrant Co. v. Gallagher, supra, 306 U.S. 62; McGoldrick v. Berwind-White Co., supra, 309 U.S. 33; General Trading Co. v. Tax Commn., supra, 322 U.S. 335. See, also, the later case of D.H. Holmes v. McNamara, supra, 486 U.S. 24.

Bellas Hess, in effect, applied the first and fourth prongs of the test as grounds for declaring the tax unconstitutional. It found that there was not sufficient nexus, based on the view that the taxpayer's only connection with the taxing State was by common carrier or by mail. It also found that the taxing State had not given the taxpayer anything for which it could ask a return as a fair share of the cost of local government.

Even if we assume that these conclusions were sound with regard to the Bellas Hess company at the time they were reached in 1967,

there are strong reasons for concluding that different conclusions should be reached today with regard to the petitioner in the present case.

Since the first and the fourth prongs of Complete Auto, nexus and a tax fairly related to the services provided, are in many ways intertwined, we shall deal with both together. Petitioner's nexus to North Dakota is not limited to the delivery of its goods by common carrier or by mail. This conclusion in Bellas Hess rested on the theory that there could be no nexus unless the vendor owned or leased property in the taxing State or had agents there. This approach became so rigid a basis for tax viability that property or agents in the state sufficed even though the property or agents had nothing to do with the sales of the property on which the tax was based. Justice Frankfurter warned against such a practice in

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), when he said (p. 445):

> "Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

Even without a physical nexus, there is no justification for treating a State which provides a substantial market for your products as a result of your soliciting of sales by forwarding catalogs by mail to potential customers as having no right to tax solely because the seller has no physical presence in the taxing State. Certainly local competing vendors are well aware of the sales they lose to mail order houses located outside the State. With the burgeoning market for mail order products and the

resulting loss of sales/use taxes, the physical presence doctrine should be reconsidered.

In this case as in many, if not most, mail order sales, the sales are sales on approval as provided in the Uniform Commercial Code §2-326*. Such a sale keeps the title in the vendors until the goods are accepted. Uniform Commercial Code §2-327. The first of these sections provides that a "sale on approval" occurs when the goods are delivered primarily for use and when the goods may be returned by the buyer even though they conform to the contract. This was true of Quill's.

Thus the Quill Corporation had title to its products until the buyer accepted them.

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* Petitioner denies this and, as a result, the North Dakota Supreme Court thought it unnecessary to pass on the issue. But the facts make it so clear that the section applies and that the sales are so clearly sales on approval that this Court should so decide. If not, the case should go back to the State Court for a decision on this issue.

During the period of delivery in North Dakota and until the buyer accepted the delivered goods the police and fire protection of North Dakota was available for property which was still owned by the seller, the Quill Corporation. [It is not clear whether the title remained in the Bellas Hess company when its goods were delivered in Illinois.]

North Dakota also has the need to dispose of Quill's catalogs when they are discarded as waste. It is no adequate answer to say that the catalogs are the waste of the potential customers. This might be true where each catalog was specifically requested, but generally catalogs are sent to potential customers even though they have not requested them. In such instances there can be no doubt that the out-of-state vendor created the waste to be disposed of by the taxing State.

North Dakota's courts are available to assist petitioner to collect unpaid obligations

owed by its customers in that State. In an affidavit in support of a motion for summary judgment the petitioner stated that invoices for merchandise shipped to customers were mailed "usually within one day of the shipment" (JA30). Since the merchandise was shipped before bills were sent, there is a real possibility that some of these bills will not be paid even though the shipped goods are not returned. It may be that Quill has not thus far used the North Dakota courts, but any time a bill is not paid there will, with rare exception, be a need to use those courts to collect it.

The great difficulties foreseen in Bellas Hess with regard to use taxes imposed by numerous jurisdictions with varying tax rates has largely disappeared with the great advances in the use of computers. Software can be prepared, and may already be available, to deal readily with such problems. In any event,

such problems, as well as administrative and the record-keeping requirements, were necessarily involved with respect to the various use taxes upheld in the cases which sustained the tax because of physical presence in the taxing State.

It should not be forgotten that the requirements of a use tax on an out-of-State vendor are far less than a tax imposed directly on such a vendor. All that he is required to do under a use tax is to collect the tax from a customer who lives in the taxing State and who is obliged to pay it.

(4)

In Bellas Hess it was pointed out that the issue of due process as applied to a tax on deliveries across State lines is essentially the same as the issue arising under the commerce clause. Other cases hold that, if the four-prong test of Complete Auto is met, due process is satisfied. Accordingly, we rely on

our argument concerning the commerce clause as adequate to meet the due process attack.

c. Federal legislation

Petitioner insists that, if the physical presence test for nexus is to be abandoned, it should be done by an act of Congress. While Congress undoubtedly may act in this area, this Court has both stricken and upheld laws challenged as violating the commerce clause, and it has changed its views so as to uphold certain types of laws which in earlier years it had invalidated. The fact that legislation in this field has been introduced in Congress does not mean that this Court cannot act on the matter. Certainly the failure of Congress to enact the proposed legislation does not indicate that Congress is opposed to the proposals contained in it. The failure of Congress or any other legislature to enact proposed legislation may rest on a wide variety of grounds. See

Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 432-434 (1969).

In the City of New York's amicus brief in Wisconsin Department of Revenue v. Wrigley (No. 91-119), we dealt with Public Law 86-272 which, to some extent, limits the situation in which an income tax may be imposed on revenues coming from interstate commerce. That legislation was the result of a report by a subcommittee of the House Judiciary Committee. (Volume 4, House Report No. 952, 89th Congress, First Session, entitled State Taxation of Interstate Commerce.) The Report recommended limitations on the right to tax with respect to income tax, sales or use taxes and gross receipts tax. Congress adopted, with some modification, the income tax recommendation, but did not adopt any legislation with regard to sales or use taxes or gross receipts taxes. This does not conclusively show the Congressional attitude,

but it does show that with respect to these taxes it was willing to leave the matter to this Court.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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